



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Whether Land Located in the
Town of Argonne, Forest County, and Owned by
James L. Palmer Shall be Withdrawn as Managed
Forest Land

Case No.: IH-01-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on May 21, 2001, at Crandon, Wisconsin, before Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources (DNR), by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

James Palmer
P. O. Box 176
Argonne, WI 54511

DNR Findings 1-10 are adopted by the Division:

1. That 42.15 acres of land located in the FR N ½ W ½ SW ¼, Section 18, Township 37, Range 13 East, Town of Argonne, Forest County, Wisconsin, and owned by James L. Palmer was entered as Managed Forest Land under Wis. Stat. § 77.82, effective January 1, 1990 by Order No. 21 002 1990 dated November 13, 1989.

2. That by letter dated December 6, 1996 the Department advised James Palmer that a recent aerial investigation in Forest County showed that timber harvesting had occurred on the above land within the previous 4-5 years. A review of Department files did not reveal any cutting notices or cutting reports had been filed as required by Wis. Stat. § 77.86(1)(b) and (4).

Moreover, the harvesting was not in accordance with the management plan prepared by the Department and signed by James Palmer on May 22, 1989.

3. That by letter dated September 26, 1997 the Department advised James Palmer that his MFL property was being investigated for the above alleged violations plus alleged failure to follow sound forestry as required by Wis. Stat. §§ 77.80 and 77.88(1)(b)4, and engaging in harvesting hay, a practice incompatible with sound forestry under Wis. Stat. §§ 77.82(1)(b)2, 77.88(1)(b)4 and Wis. Admin. Code § NR 46.15(14). The Department warned that these violations could result in the Department withdrawing the land from the MFL program under Wis. Stat. § 77.88.

4. That by letter dated October 21, 1997 the Department again advised James Palmer that he needed to file a cutting notice and cutting report for harvesting that had occurred, and warned that these violations could result in the Department withdrawing the land from the MFL program.

5. That by letter dated July 13, 1999 the Department advised James Palmer that the DNR forester had observed that the north end of a field in the MFL program had been harvested for hay for a second time (the first time being in 1997), and warned that continued haying of the MFL land would result in the Department withdrawing the land from the MFL program.

6. That by letter dated July 23, 1999 the Department advised James Palmer that he could not harvest hay on the part of the field in the MFL program if he wished the land to remain as MFL land.

7. That by letter dated August 14, 2000 the Department advised James Palmer that the DNR forester had observed that hay again had been harvested on the MFL part of the field, and accordingly the forester was recommending that the Department withdraw this land from the MFL program for failing to file a cutting notice; failing to follow an approved management plan; failing to follow sound forestry; failing to file a cutting report; and engaging in practices incompatible with sound forestry. Mr. Palmer resolved the violations for failing to file a cutting notice and cutting report by filing a cutting notice received by the Department on October 30, 1997 and a cutting report received by the Department on October 30, 1997. But because Mr. Palmer had repeatedly harvested hay, a practice incompatible with sound forestry, the Department sought to withdraw the land from the MFL program.

8. That on August 28, 2000 the Department issued Order No. 21 002 1990, effective January 1, 2001, withdrawing the entire 42.15 acres of land from the MFL program pursuant to Wis. Stat. § 77.88(1) and Wis. Admin. Code § NR 46.22, because part of the MFL land was being used for hay production, a use incompatible with the practice of forestry. A copy of the Order was mailed to James Palmer by letter dated August 31, 2000.

9. That James Palmer contacted the Department in September, 2000 and attempted to have the Order rescinded. The Department declined to do so, but by letter dated October 4, 2000 extended to October 22, 2000 the deadline for Mr. Palmer to request a hearing under Wis. Stat. § 77.90 and Wis. Stat. ch. 227, and Wis. Admin Code § NR 2.

10. That by letter dated October 10, 2000 and received by the Department on October 16, 2000, James Palmer requested a hearing on the involuntary withdrawal.

11. Palmer does not deny that on three separate occasions he hayed a two-acre section of the above-described MFL parcel. Said haying constitutes an active agricultural use incompatible with sound forestry practices. (Williams)

DICUSSION

Mr. Palmer does not dispute haying a small portion, roughly two acres, of the 42.15 acres entered in the Managed Forest Law program. Further, Mr. Palmer concedes that such haying is not allowed by the administrative code and that he was twice advised not to hay the area. Instead, he argues that he was not informed that the program would allow him to mow and leave the hay on the field.

If the haying had occurred once, or even twice, this argument might ring more true. However, it is difficult to accept given the record developed at hearing. Mr. Palmer hayed this field no less than three times, twice after having received specific letters from the DNR Forester, Mr. Craig Williams, advising him that “continued use of this property for hay will result in . . . removal from the Managed Forest Law.” (Ex. 16 & 18)

Mr. Palmer’s unwillingness to comply with MFL program rules has required extensive DNR staff involvement over the past four years. In December, 1996 and September, 1997, Mr. Palmer was advised that he had failed to provide a cutting notice and report for unauthorized harvesting of MFL program trees. It took three letters to get his attention focused on meeting program requirements. (Exs. 10-12) At length, a compromise with the DNR was entered and the cutting notice report and severance tax issues were resolved. However, the unauthorized cutting damaged the stand of timber because the most marketable trees were harvested, rather than those that would benefit the stand as a whole. (Williams) Significantly, even more DNR staff time would now be required to come up with a new plan given Mr. Palmer’s failure to follow the previous plans.

After these problems, and numerous threats of withdrawal, came two more instances of haying—a use incompatible with sound forestry. The fact that only two acres were hayed is not significant. The law is clear that use of “any part” of MFL for a use incompatible with sound forestry can lead to a withdrawal of MFL status. Wis. Stat. § 77.88(1)(b)(4) Mr. Williams, the DNR Forester, even took the time to flag the boundaries of the MFL lands to make it clear where haying should not occur. All of this was to no avail, and the property was hayed again in both 1999 and 2000. (Exs. 17 & 19)

Under these circumstances, the excuses presented at the hearing are simply not convincing. The first was that a neighboring farmer haying the field was responsible for haying the MFL field and that the farmer must have misunderstood Palmer’s directions not to hay the MFL area. Clearly, it was Palmer’s responsibility, after two prior warnings, to ensure that the

MFL area was not hayed. The second argument raised by Palmer was that he did not derive personal benefit from the haying because the neighboring farmer did it for Mr. Palmer as a favor. Again, this argument makes little sense given the two prior warnings for haying under similar circumstances. Finally, there is the argument that because the DNR failed to inform him that he could cut the grass if the hay were not removed, somehow Mr. Palmer is absolved from responsibility for repeatedly violating MFL program requirements. But the MFL program is not a one-way street. Participants derive a tax benefit so long as they keep themselves informed of program requirements and practice sound forestry. Mr. Palmer has failed to do either, and the DNR order to withdraw his land is upheld.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders relating to withdrawal of Managed Forest Lands pursuant to Wis. Stat. §§ 227.43 and 77.88.

2. The purpose of the Managed Forest Lands program is to encourage the management of private forest lands for the production of future forest crops for commercial use through sound forestry practices, recognizing the objectives of individual property owners. Wis. Stat. § 77.80.

The Department of Natural Resources is charged by the Legislature with the administration of the Managed Forest Lands program and its judgment as to what constitutes “sound forestry practices” is entitled to deference. Land developed for a use that is incompatible with the practice of forestry is not eligible for designation under the Managed Forest Law, Wis. Stat. § 77.82(1)(b)(2).

3. Active agricultural land is not eligible for MFL treatment because it is a use incompatible with sound forestry. Wis. Admin. Code NR 46.15(14). The repeated haying of two acres of MFL land constitutes a use incompatible with sound forestry practice.

4. Wis. Stat. § 77.88 provides in pertinent part:

(1) Withdrawal By Department Order. (a) The department may, at the request of the owner of managed forest land or of the governing body of the municipality in which any managed forest land is located, or at its own discretion, investigate to determine whether the designation as managed forest land should be withdrawn. The department shall notify the owner of the land and the chairperson of the town or the president of the village in which the land is located of the investigation.

(b) Following an investigation under par. (a), the department may order the withdrawal of all or any part of a parcel of managed forest land for any of the following reasons:

1. Failure of the land to conform to an eligibility requirement under sec. 77.82(1).
2. The owner's failure to comply with this subchapter or the management plan.
3. Intentional cutting by the owner in violation of sec. 77.86.
4. The owner's development or use of any part of the parcel for a purpose which is incompatible with the purposes specified in sec. 77.80.

...

Mr. Palmer has "failed to comply with the management plan" within the meaning of Wis. Stat. § 77.88(1)(b)2, and has used a "part" of the parcel for a purpose incompatible with sound forestry practices within the meaning of Wis. Stat. § 77.88(1)(b)(4).

ORDER

IT IS HEREBY ORDERED that the following land be withdrawn from designation as Managed Forest Land and be assessed as general property beginning the first day of January following the date of this order (January 1, 2002):

This is a **complete** withdrawal of land designated under Order No 21 002 1990.

Township 37	North, Range 13 East	Entry Year	Total Acres
Section 18	FR N ½ W ½ SW ¼	1990	42.150
Total Acreage for Order			42.150

A Withdrawal Tax to be calculated by the Department of Revenue pursuant to Wis. Stat. § 77.88(5), is due and payable to the Department of Natural Resources by the last day of January, 2002. If unpaid, the taxation district clerk shall enter the delinquent amount on the property tax roll as a special charge.

Dated at Madison, Wisconsin on June 14, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.